Supreme Court, U.S.
FILED

03 262 AUG 15 2003

In The
Supreme Court of the United States

ERIC GRILLOT

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

Petition for Writ of Certiorari To The
Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

LYNN D. LISK.
415 N. McKinley #150
Little Rock, AR 72205
(501) 666-5475
Petitioner's Counsel
of Record

July 30, 2003

132 pp

In The

Supreme Court of the United States

ERIC GRILLOT

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

Petition for Writ of Certiorari To The
Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

LYNN D. LISK.
415 N. McKinley #150
Little Rock, AR 72205
(501) 666-5475
Petitioner's Counsel
of Record

July 30, 2003

QUESTIONS PRESENTED

I. Arkansas violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U. S. Constitution when it grants the prosecution's request for a jury instruction on a lesser included offense when the criminal defendant is barred from requesting it and objects to it.

II. Arkansas is in violation of Fifth Amendment of the U.S. Constitution and *Miranda vs. Arizona*, 384 U.S. 436 (1966) in its ruling that the Petitioner's confession was not to be suppressed when, during the course of the confession, the police specifically stated to the Petitioner that his confession would not be used in court.

PARTIES TO THE ACTION

All the parties to this case are listed in the caption.

TABLE OF CONTENTS

Table of Authorities.....iv

Statement.....4

Issues
Raised.....6
A. Jury Instruction Issue.....9
B. Confession Suppression.....11

Argument for Writ.....13
A. Lesser Included Offense Issue.....13
B. Suppression Issue.....24

Conclusion.....24

Appendices

Appendix A: Opinion of the Arkansas Supreme Court

Appendix B: Excerpts from the trial transcript

Appendix C: Excerpts from the confession of the Petitioner

Appendix D: Excerpts from the confession of Jeremy Phillips

TABLE OF AUTHORITIES

CASES:

Beck v. Alabama, 447 U.S. 625 (1980)

Britt v. State, 344 Ark. 13, 38 S.W.3d 363 (2001)

Commonwealth v. Woodward, 427 Mass. 659, 694 N.E.2nd 1277 (1998)

Commonwealth v. Gould, 413 Mass. 707 __ N.E.2nd __(1992)

Commonwealth v. Thayer, 418 Mass. 130, __ N.E. 2nd__ (1994)

Doby v. State, 290 Ark. 408, 720 S.W.2d 694 (1986)

Hopkins v. Reeves, 524 U.S. 88 (1998)

Nichols v. State, 62 Ark. App. 212, 11 S.W.3d 451 (2000)

Schmuck v. U.S., 489 U.S. 705 (1989)

State v. Jones, 321 Ark. 451, 903 S.W.2d 170 (1995).

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, U.S. Const.
Sixth Amendment, U.S. Const.
Fourteenth Amendment, U.S. Const.

STATUTES AND RULES:

28 U.S.C. § 1257(a)

Ark. Code Ann. § 5-1-110(c)

In The

Supreme Court of the United States

ERIC GRILLOT,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

Petition for Writ of Certiorari To The
Arkansas Supreme Court

Petitioner, Eric Grillot, respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (Appendix A) is reported at ____ Ark. ____, ____S.W.3d _____(Ark.CR01-792, 5-22-2003).

JURISDICTION

The Arkansas Supreme Court decided the appeal in this case on May 22, 2003. (App. A, *infra*). A petition for re-hearing was not sought and this petition is brought within ninety (90) days of the entry of mandate in the case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides as follows:

No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Sixth Amendment to the U.S. Constitution provides as follows:

In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . .

The Fourteenth Amendment to the U.S. Constitution, § 1, provides in pertinent part as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty o9r property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Eric Grillot was convicted on August 25, 2000, after a three day jury trial, of First Degree Murder, Hindering Apprehension, Aggravated Robbery and Theft of Property. Over the objection of the Petitioner, the First Degree Murder charge was presented to the jury as a lesser included offense on the charge of Capital Murder. The Petitioner was sentenced to serve a term of twenty (20) years in the Arkansas Department of Corrections. These convictions and the sentence was affirmed by the opinion of the Arkansas Supreme Court on May 22, 2003. In this Petition for Writ of Certiorari the Petitioner challenges only the constitutionality of the giving of the First Degree Murder instruction to the jury over his objection and the refusal to suppress his confession prior to the trial.

To summarize the facts of the case, on February 14, 1998, the Petitioner, and his two roommates, Jeremy Phillips and Will Jackson, using Will Jackson's truck, left Alabama where they shared a trailer and drove all night to Arkansas. Jeremy Phillips and the Petitioner were originally from Arkansas and supposedly Jeremy Phillips had decided to move back to Arkansas and the Petitioner was coming along for the ride and to visit his family in the area. Allegedly there was an arrangement whereby Jeremy Phillips would obtain a quantity of marijuana for use in paying Will Jackson for the use of his truck in the move. Upon arriving in Fairfield Bay, Arkansas, some visits with family members took place and Jeremy Phillips supposedly made a phone call to set up the delivery of the marijuana. The three then drove to a secluded spot where they were allegedly to wait for the marijuana to be

delivered.

At this time, being tired from the all night drive, the Petitioner claims he fell asleep in the truck while sitting behind the steering wheel and was awakened by a loud "bang." The noise was actually the sound of Jeremy Phillips, who was in the back seat of the truck, shooting Will Jackson (who was sitting in the front passenger seat) in the back of the head with a .44 caliber pistol. Will Jackson died instantly from the gunshot wound.

The Petitioner then assisted Jeremy Phillips in concealing the body of Will Jackson in the woods and cleaning the blood out of the vehicle. The Petitioner then dropped Jeremy Phillips off at his home in Arkansas and drove Will Jackson's truck back to Alabama where he abandoned it and threw the keys into a body of water.

Shortly thereafter, the victim's father reported Will Jackson as a missing person to the Alabama authorities and an investigation as to his whereabouts was begun in Alabama. The Petitioner was interviewed and told the police in Alabama that he and Will Jackson had returned from Arkansas together and that the day after their return he had gone to work leaving the victim in their shared residence and that he did not know where he was or what had happened to him, but that Will Jackson had mentioned something about a job in Florida. The Petitioner repeated this story to the victim's father on several occasions as well.

Soon after this, the Petitioner himself decided to move back to his former home in Fairfield Bay, Arkansas. Shortly after his arrival there he and Jeremy Phillips were called in for questioning by police in Fairfield Bay who had been

asked to follow up on the Alabama missing person investigation. The Petitioner and Jeremy Phillips basically repeated the same story that the Petitioner had already told in Alabama and they were released. A few days later, Will Jackson's body was discovered and the police were sent to bring in the Petitioner and Jeremy Phillips for further questioning since the police now knew the story of the return trip to Alabama with the Petitioner had been false. It was during this interrogation that the Petitioner told the truth about what had taken place and Jeremy Phillips confessed to the actual murder.

Initially, the Petitioner was charged with Hindering Apprehension based on his complicity in covering up the murder after the fact, but he was not charged with the murder itself as he had no knowledge or complicity in it according to both himself and Jeremy Phillips. However, After Jeremy Phillips was convicted of the murder, he contacted the police and gave them a second statement from prison in which he claimed that the Petitioner had been directly involved in the killing of Will Jackson and that it was a murder-for-hire scheme (Appendix D1-2). Based on this second statement, in February 2000, the state of Arkansas amended the charges against the Petitioner to include a charge of Capital Murder (Appendix B17, 20-21).

A Motion to Suppress the Petitioner's confession was begun on May 10, 1999 and further evidence was taken on May 24, 1999. On August 7, 2000 the Motion to Suppress the confession was denied (Appendix B24).

At the trial the Petitioner admitted responsibility for trying to cover-up the murder and his guilt on the Hindering

Apprehension charge. However, he continued (and continues to this day) to deny that he had any prior knowledge that the murder was going to take place.

At the close of the trial the state requested the jury be instructed on the lesser included offense of First Degree Murder. However, the Petitioner objected to the jury being instructed on this as it was, for him, an "all or nothing" case. Because of his denial of any knowledge of, complicity with or involvement in the murder, under the state cases of *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000),[1] there was no rational basis to give the instruction and had the Petitioner requested the instruction it would properly have been refused. However, the instruction was given based on the State's request and the Petitioner was convicted on the lesser charge.

It is still unclear as a matter of state, federal and constitutional law whether a jury instruction on a lesser included offense is properly submitted to a jury when the Defendant himself objects to the giving of the instruction. Particularly when the Defendant himself would be barred from requesting the instruction due to his complete denial of any involvement in any offense and hence a lack of a rational basis for his request since such a request is inconsistent with the defense of non-involvement.

A. The Jury Instruction Issue:

---

[1]Note: the *Doby* case was not argued to the trial court, but was raised in the direct appeal to the Arkansas Supreme Court

During the trial when it came time for discussion of the Jury instructions to be given, the following pertinent exchange took place (*See*, Appendix B27-29 for the entire discussion reproduced below is the abstract from the direct appeal):

> **Defense:** We do not want an instruction on a lesser included offense. *Nichols v. State*, 62 Ark. App. 212 (2000) applies. We deny we committed any murder at all or were an accomplice to a murder. We deny all liability for the murder. For the jury to be instructed on a lesser included offense is inconsistent with our defense.
>
> **Prosecution**: In the *Nichols* case the defendant requested lesser included, but also denied he had done anything. He was asking to submit two inconsistent defenses to the jury and the court said it was proper to deny the lesser included offense instruction in that situation. Here the Defense says no murder took place but we say it did, there is no inconsistent position on your part. We're entitled to the lesser included instruction.
>
> **Defense:** We don't say a murder didn't occur, we just deny all liability for it.
>
> **The Court:** The objection is noted, but the lesser included instruction will be given.
>
> In its discussion of this issue in the Arkansas Supreme Court it was noted that they had never decided the issue of whether the State could receive an instruction on a lesser included offense over the Defendant's objection (Appendix A35-36). However, they then

ruled, by a two part holding, in such a manner as to effectively "dodge" the issue[2]:

First: they held that the Petitioner could not be heard to complain on the issue because he had failed to move for a directed verdict on the lesser included charge (the charge he objected to be given (*See*, Appendix A7-8)); and

Second: because even though the Petitioner denied all involvement in the murder, he was actually only denying having the requisite mental state, not the act of the murder itself. The Arkansas Supreme Court held that reliance on *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) was misplaced since in that case the defendant had denied the very act, in this case the act was conceded, it was only the state of mind that was at issue.(*See* Appendix A 22-23)

B Suppression of the Confession

At the time of the Petitioner's being brought in for questioning after the body had been discovered the evidence was abundantly clear that the Petitioner had just finished smoking marijuana and was "high." The officer who brought him in testified that the apartment he had picked him up from had a "cloud" of marijuana smoke in it (Appendix B11-12) and the Petitioner himself stated at the end of his confession that he was high when he was first brought it, but had "come down" since then (Appendix A13, Appendix C1). The bottom line being that it is abundantly clear that the Petitioner

---

[2]As noted by the Dissenting opinion (Appendix A29-38) "This court must address the issue of whether the State is entitled to an instruction. . . The majority has not provided this analysis or answered the question posed by this issue." *Id.*

was "high" at the time he executed a waiver of his Miranda rights before the questioning.

The statement itself is over two hours long and transcribed it runs approximately one-hundred-fifteen (115) pages in length (Appendix A28) For the first hour of the questioning the police allowed the Petitioner to repeat his false story about the trip back to Alabama. They then revealed to him that they knew he was lying because they had found the body and they asked him if he would like to "start all over again." to which he replied he would (Appendix C3) He then began telling them the truth about what happened, but at one point directly asked the officers "is this tape going to be played in court" to which the officer responded "no.," (Appendix A18-19 and Appendix C4-5). Petitioner took the position in his appeal to the Arkansas Supreme Court that this exchange was a clear abrogation of his rights and further showed clearly that at the time he was mirandized that he did not have a clear understanding of the rights he was giving up and the statement should be suppressed. The Arkansas Supreme Court ruled that it was clear the Petitioner understood his rights based on a totality of the circumstances test, relying primarily on the fact his statement was cogent and not revealing of any delusional thinking. (Appendix A10-15). They also stated that since the Petitioner had already begun confessing that the direct lie about the effects of Miranda could not be said to have induced the confession so the argument was without merit (Appendix A19)

WHY THE WRIT SHOULD BE GRANTED

A. The Lesser Included Offense Issue

First of all, it should be noted that this court has never addressed the issue of whether it is proper to give a lesser included offense instruction over the objection of a criminal defendant. As noted by the Arkansas Supreme Court, when it is supported by even the slightest evidence, it is error to refuse a Defendant's request for a jury instruction on a lesser included offense (Appendix A25), *Britt v. State,* 344 Ark. 13, 38 S.W.3d 363 (2001). That this is a correct application of the U.S. Constitution is supported by this court's opinions in *Beck v. Alabama*, 447 U.S. 625 (1980) and *Hopkins v. Reeves*, 524 U.S. 88 (1998) and finds further support in Fed. Rule Crim. Pro. 31(c). However, this case involves an inapposite question that has never been addressed by this court which can be phrased as: *is it constitutional to give an instruction on a lesser included offense when such an instruction is objected to by the Defendant.* This question is compounded in the instant case by the Defendant's denial of any involvement in the crime whatsoever and the Arkansas Supreme Court's holdings in *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000) which hold it is inconsistent for a defendant to deny any and all involvement in a crime and then turn around and ask the jury to be instructed on a lesser

included offense. In other words, the very specific question posed in this case is: "*is it constitutional to give an instruction on a lesser included offense when such an instruction is objected to by the Defendant and such an instruction may not be requested by the Defendant.*" [3]

The Arkansas Supreme Court found in the case at bar that there was a rational basis (i.e. there existed "even the slightest evidence" *Britt, Supra*) that supported the giving of the instruction on the lesser included offense but effectively ignored the question of whether it was permissible to give the instruction over the Defendant's objection (Appendix A25, 37) As noted by the dissenting opinion in the case (Appendix A29-38) the court failed to address the issue of whether it is proper to give an instruction on a lesser included offense, even if it is supported by the evidence, when the Defendant himself objects to the giving of that instruction (Appendix A37). Finally, both the dissent and the majority opinion take the position that the evidence supported the giving of the instruction and gave only passing consideration to the idea that the instruction would (pursuant to *Doby* and *Nichols,*

---

[3]The Petitioner is mindful of the Arkansas Supreme Court's decision in *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995). However, that case rested on an interpretation of Ark. Code Ann. § 5-1-110(c). That statute was never argued or mentioned by the Petitioner in this case and its interpretation was not before the court as they duly noted in footnote number 6 to the majority's opinion (Appendix A28).

Supra) have properly been refused had the Petitioner requested it and the state objected.[4]

This is a constitutionally compelling and extremely important issue that has never been directly addressed by this court or any federal circuit and has only been addressed sparingly by the various states. The most exhaustive discussion of the issue Petitioner could find is in the infamous *au pair* case of *Commonwealth v. Woodward*, 427 Mass. 659, 694 N.E. 2nd 1277 (1998). In that heavily publicized case a British *au pair* was charged with First Degree Murder for the death of a baby in her care. The Jury was also instructed on the lesser included offense of Second Degree Murder. However, the Defendant objected to an instruction on the other lesser included offense of Manslaughter and the jury was not instructed on that offense. The Jury then found her guilty of Second Degree Murder and sentenced her to life in prison. However, in post-trial proceedings, the trial judge reduced the jury's verdict to Involuntary Manslaughter, gave her credit for two-hundred-seventy-nine (279) days served and set her free. On the state's appeal to the Supreme Judicial Court of Massachusetts from this reduction in the conviction, the court found it was

---

[4]Admittedly the Supreme Court's opinion does mention *Doby*, but it claims the Petitioner's reliance is misplaced since the evidence would not require the jury to believe the Petitioner was guilty of capital murder or nothing at all because he did not deny the act of murder took place, only that he had the requisite mental state. *See*, Appendix A23 As noted herein, the Petitioner takes issue with this characterization of the matter.

error to have not given the manslaughter charge in the first place and that a lesser included offense charge should be given anytime the evidence supports it, no matter who requests or objects to it. In making this finding the court relied upon its prior holdings in the case of *Commonwealth v. Gould*, 413 Mass. 707 __ N.E. 2nd ___(1992) and a line of similar cases holding that if the evidence supports a finding on a lesser included offense then a judge must, upon request, give the instruction on that lesser offense. In finding that the rule applied to both the state and the defense the court in *Woodward* relied on *Commonwealth v. Thayer*, 418 Mass. 130, __ N.E. 2nd __ (1994) and related cases holding that the test to determine if a lesser included offense instruction was required was whether it was supported by the evidence, not who objects to it. In making their findings in this regard in the *Woodward* case, the court cited *Schmuck v. U.S.*, 489 U.S. 705 (1989) and particularly *Schmuck*'s 9th footnote which cited *Beck v. Alabama*, 447 U.S. 625 (1980) and Fed. R. Crim. P. 31(c) *Woodward* at fn. 8. However, their reliance on these cases is, in Petitioner's opinion, misplaced. In *Beck* the issue revolved around an Alabama statute that forbade the giving of lesser included offense instructions in a Capital Murder case and in *Schmuck* the issue revolved around a defendant's request for a lesser included instruction. All those cases held was that it is unconstitutional to impose the death penalty without permitting the jury to consider a true lesser included offense (*Beck*) and that a lesser included offense is defined by the elements of the greater and lesser offenses instead of by an "inherent relationship" test

(*Schmuck*). Contrary to the Massachusetts' seeming opinion of these cases, neither dealt with the issue of a defendant's objection to the giving of an instruction on a lesser included offense. Furthermore, the Petitioner here would take issue with the Massachusetts' court's holding regarding the objection to a lesser included instruction by defendant.

If the state charges a person with a crime then that person is entitled, if he so chooses, to make it an "all or nothing" affair. The state charged the Petitioner with Capital Murder (Appendix A4 and B20-21). As noted time and again by this court, the Constitutional requirement for conviction on a criminal charge is proof beyond a reasonable doubt. In the case at bar, the Petitioner attempted to hold the state to this requirement and make the state prove exactly that which they had charged, but was denied his right to do so because the state was allowed to throw a few extra offenses his way. Allowing the state to request and get instructions on lesser included offenses over a defendant's objection gives the state an unfair advantage in that they can charge someone with the most horrendous crime they can imagine knowing they'll get more than one shot at having that person convicted of something. It is an invitation to "overcharging" by a state if they know they will be able to rely on the giving of lesser included offense instructions to correct their misplaced zeal to obtain a conviction. It is the Petitioner's contention that when a state decides to charge a person with a crime, then

under the 5th, 6th and 14th Amendments to the U.S. Constitution, the person so charged is entitled to make it an all or nothing affair.[5] Allowing the state to charge a jury with lesser included offenses over the objection of a criminal defendant is an abrogation of the defendant's right to be found guilty of the crime charged beyond a reasonable doubt. It effectively gives the state more than one bite at the apple and is violative of Due Process.

Secondly, there is the issue raised by *Doby v. State*, 290 Ark. 408, 720 S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000) that being the inconsistency of denying any involvement in a crime whatsoever and then having the jury instructed on lesser included offenses. If it is inconsistent for a criminal defendant to deny any involvement but request lesser included instructions, then surely the same must be said for the state. To hold otherwise is to deny Due Process and Equal Protection of the law to criminal defendants. The Petitioner herein has no doubt that if he had requested the jury instruction on the lesser included offense and the state had objected, on appeal the Arkansas Supreme Court would have held that pursuant to *Doby v. State*, 290 Ark. 408, 720

---

[5]The wisdom of objecting to an instruction on a lesser included offense is not an issue here. Clearly the bulk of the requests for lesser included instructions will come from criminal defendants and, as is evident by this court's having never faced or ruled upon the issue, fewer still will object to their being given. However, the Petitioner's point is they should have the right to make such an objection and gamble on an "all or nothing" result.

S.W.2d 694 (1986) and *Nichols v. State*, 62 Ark. App. 212, 11 S.W.3d 451 (2000) it was proper to refuse the instruction as:

> when a defendant asserts that he is entirely innocent of any crime, no rational basis exists to instruct the jury on a lesser-included offense, as the only issue for the jury is whether the defendant is guilty as charged. *Id.* at 215 (emphasis added).

> "His defense was that he was entirely innocent of any crime [and that] there was no truth at all to the state's case [therefore it is] a case of all or nothing [and there is] no rational basis to give [a lesser-included instruction]. *Id.* (discussing the court's analysis in *Doby*)

> Doby rested his entire defense on his credibility against that of the officers. So as a practical matter, it came down to whom should the jury believe. There would be no rational basis to find the officers lied in part in this case. Their testimony so sharply conflicted with Doby's that it would not be reasonable to expect a jury to pick and choose and come up with a finding of a lesser offense when to do so would require a finding that Doby was a liar and the officers liars in part. If Doby had admitted possessing the drugs, it might make sense to require the charge of the lesser offense. But his defense was that he was entirely innocent of any crime: he possessed nothing. Therefore, the jury only had one question to decide, whether he was guilty as charged..

Doby at 412

A *Doby* like situation is exactly what is present in this case. In order to convict the Petitioner on any murder offense the jury had to believe that the Petitioner was a liar and his alleged accomplice, Jeremy Phillips, lied in part and told the truth in part. The Petitioner claimed that he was entirely innocent of any murder offense, either in the act or in any requisite mental state. In *Doby* the defendant denied both committing the act and having the requisite mental state. In the case at bar, it was admitted that the Defendant did not conduct the actual act of murder so all that is left is the requisite mental state and he completely and totally denied having any culpable mental state that fell into the definition of any murder, whether it be knowing, purposeful, reckless, negligent, or any other legally defined mental state. He had no idea a killing was going to take place at all. Under this circumstance the Petitioner is being denied equal treatment under the law since he is in a position that prevents him from requesting an instruction on a lesser included charge, but the state is not under the same restriction.

Finally, the Petitioner will concede that the cases in state courts in which this issue has arisen have generally ruled that lesser included instructions should be given whenever the evidence supports a finding on a lesser charge without regard to who requests or objects to the instructions. *See*, *Commonwealth v. Woodward*, 427 Mass. 659, 694 N.E. 2nd 1277 (1998) at fn. 8. However, Petitioner takes the position that those courts are incorrect and that under our constitutional scheme, a defendant is entitled to object to a lesser included charge and make a case an all or nothing

affair. The state has the burden of proof and is in total control of what a criminal defendant is charged with. They should not be permitted to "fudge" on the issue and rely on lesser included offenses to remedy their errors or misplaced zeal in bringing charges against someone. If a person is charged with Capital Murder and the state refuses to reduce the charge to First Degree Murder (which they can do at any time right up until the jury is instructed and which, if done in this case, would have avoided this entire issue), then the defendant should have the right to make them meet their burden on that charge or nothing at all. It is unconstitutional to give a jury instruction on a lesser included offense over the objection of the criminal defendant. Particularly when the defendant himself has no right to request the lesser included instruction himself. The 14th, 5th and 6th Amendments to the U.S. Constitution are called into issue on this matter and it is an issue that is ripe for resolution by this court.

B. Suppression of the Confession Issue

That the Defendant was "high" (i.e. intoxicated) at the time he executed his Miranda waiver cannot be disputed (Appendix A13-15 , Appendix B11-13 and Appendix C1-2) and that he didn't fully understand what he was doing in regard to his waiver and confession is clearly evidenced by his specific request to know if the tape of his confession was going to be played in court. The error is further compounded by the police officer's statement that it would not (Appendix A18-19 and Appendix C4). Petitioner takes the position that the evidence is clear he did not understand the import of his Miranda waiver, otherwise he would have never asked if the tape was going to be used and for the police to lie to him is

unforgivable because the tape was used in court and a transcript of the tape was introduced into evidence. (Appendix A28). The trial court erred in refusing to suppress the confession and the Arkansas Supreme Court erred in upholding this ruling. The Arkansas Supreme Court said it was relying on a totality of the circumstances test to determine if the confession was voluntary, but they truly only discussed the cogent nature of his statement and the fact he repeated the same lie about the trip back to Alabama (Appendix A14). They further compound their error by finding the lie about the use of his confession in court was made only after he had already confessed and it did not, therefore, actually induce the confession. Petitioner takes the position that anytime a direct lie about the effects of a Miranda warning is made, such as happened in this case, the entire confession is tainted and certainly the knowing and voluntary nature of a waiver of Miranda rights is called into issue. The confession should have been suppressed and the failure to do so violated the Petitioner's 5th Amendment rights.

CONCLUSION

Neither this court nor any of the federal circuits have directly ruled on the issue of whether it is proper to give a jury instruction on a lesser-included charge over the objections of a criminal defendant. This issue is of a compelling interest and this case presents that issue ripe for review by this court. This court should grant the Petition for Writ of Certiorari and enter its ruling that the giving of such an instruction over the Defendant's objection is an abrogation of his right to make the state prove their charges against him beyond a reasonable doubt. Finally, this court should find that the courts of Arkansas erred in refusing to suppress the confession of the Petitioner as he was intoxicated when he executed his Miranda waiver and a direct and explicit lie regarding the effect of that waiver was told to him by the interview officers.

Respectfully Submitted,
THE LISK FIRM
415 N. McKinley
Suite 150
Little Rock, AR. 72205
(501) 666-5475
(501) 666-5434 (fax)

By: _____
Lynn D. Lisk
Attorney at Law
Arkansas Bar #90149

CERTIFICATE OF SERVICE

Comes now Lynn D. Lisk, Attorney for the Petitioner in this matter and affirms that 3 copies of the foregoing pleading were served via ( ) facsimile copy, (X) hand delivery, ( ) 1st class U.S. Mail, or ( ) registered mail upon the office of the Attorney General for the state of Arkansas on the 12 day of August, 2003

_____
Lynn D. Lisk